Filed 1/24/05 In re I.G. CA1/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re I.G., a Person Coming Under the Juvenile Court Law.	
SAN FRANCISCO COUNTY DEPARTMENT OF HUMAN SERVICES, Plaintiff and Respondent, v. I.G., Defendant and Appellant, BONNIE C., et al., Defendants and Respondents.	A105340 (San Francisco County Super. Ct. No. JD01-3236)

Three-year-old I.G. appeals the juvenile court's dispositional order, pursuant to Welfare and Institutions Code section 387,[1] placing I.G. in long-term foster care. I.G. contends there was not substantial evidence to support the juvenile court's finding that I.G. was not a proper subject for adoption and had no one willing to accept legal guardianship and, therefore, the order bypassing a section 366.26 hearing and placing I.G. in long-term foster care was unlawful and must be reversed. She also contends the juvenile court violated her due process right to present evidence and cross-examine

[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

witnesses. I.G.'s mother, Bonnie C., and father, Russell G., have each filed a respondent's brief arguing against I.G.'s position, while the San Francisco Department of Human Services (Department) has written a letter stating that it "has been persuaded by Minor's position," and therefore has not filed a respondent's brief. We shall reverse and remand the matter with directions to set a section 366.26 hearing.

FACTUAL AND PROCEDURAL BACKGROUND

On May 23, 2001, the Department filed an original dependency petition alleging that I.G., who was several days old, came within the provisions of section 300, subdivisions (b) (failure to protect) and (j) (abuse of sibling). In particular, the petition described Bonnie C.'s substance abuse and emotional problems, Russell G.'s volatile behavior, both parents' criminal histories (including Bonnie C.'s convictions for child cruelty and drug-related offenses and Russell G.'s conviction for assault), and Bonnie C.'s failure to reunify with six other dependent children.

In the report prepared on May 23, 2001 for the detention hearing, the social worker reported that the Department had been notified by a hospital social worker of concerns regarding I.G.'s general neglect by Bonnie C. The social worker also reported that I.G. had been diagnosed with renal dysphasia. Bonnie C. told the social worker that she had not used crack for two and one-half years and had never abused alcohol. She also stated that she has a relationship with two of her other children, Ashley C. and Jonathan C., who live in San Francisco. Russell G. was currently raising his 12-year-old son, Von G. Russell G. said that he and Bonnie C. were currently living in an RV parked at his mother's home.

On May 24, 2001, the juvenile court ordered I.G. detained. On June 1, 2001, the court affirmed its detention order, but released I.G. to her parents.

In a jurisdiction/disposition report prepared on July 19, 2001, the social worker reported that the parents had met two years previously and were currently living with I.G. in a motor home parked at the paternal grandmother's house. I.G. was bonding well and appeared to be healthy. The social worker recommended provision of family maintenance services, which would hopefully lead to dismissal of the dependency.

At the August 8, 2001 jurisdictional/dispositional hearing, the juvenile court found true the allegations of the petition, as amended. The court declared I.G. a dependent child and ordered that she continue to reside with her parents, who were to receive family maintenance services.

In a report prepared on January 14, 2002 for the six-month status review hearing, the social worker reported that Bonnie C. was in counseling to address her depression and drug addiction. All health care providers involved with Bonnie C. had noted that she had made strides in her ability to care for and bond with I.G. Russell G. seemed attentive to I.G., although he had previously told the social worker that he did not want I.G. and wanted her put up for adoption. Russell G. also had said he would not follow through on the dismissal requirement that he attend therapy to address his anger issues. I.G. was gaining weight and was developmentally on target. She appeared to be bonded with Bonnie C. and did not display any unusual emotional behavior. The social worker recommended that the dependency continue, with ongoing supportive services.

On January 23 2002, the Department filed a supplemental petition, pursuant to section 387, which alleged that, on January 17, 2002, the parents engaged in an incident of domestic violence; I.G. was present during the fight and may have been stepped on by Bonnie C. In addition, on January 18, 2002, Bonnie C. drove to Russell G.'s home with I.G. in the car and, when she saw him getting into his truck, she rammed her car into the truck at least two times. I.G. was not properly secured in Bonnie C.'s car during this incident. The parents were arrested on January 18, 2002 for domestic violence and child endangerment.

On January 24, 2002, the juvenile court ordered I.G. detained.

In an addendum to the status review report, prepared on March 7, 2002, the social worker stated that "the department is not willing to offer services to Ms. C[.] or Mr. G[.] because of their failures in the past to reunify with previous children and their failure to maintain a safe environment for [their] daughter."

On April 25, 2002, the juvenile court sustained the section 387 petition and ordered that I.G. was to remain in a foster home. It further ordered reunification services and visitation for both parents.

In a status review report, prepared on October 10, 2002, the social worker reported that Bonnie C. was living part-time in San Francisco and part-time in Reno, Nevada, where she had been able to obtain Section 8 housing. She appeared to have just begun getting serious about participating in her recovery program. During random drug testing, she had tested positive once for cocaine and once for alcohol; otherwise all tests had been negative. She had visited with I.G. on a regular basis, and the visits were going well, although she had to be consistently reminded to pay attention to I.G. Russell G. had said in July 2002 that he was not going to participate in services, he had never wanted services, and he went to court only to offer support to Bonnie C. I.G.'s health was "excellent," according to her foster mother. She was developmentally on target, and presented as a "happy and healthy young girl." The social worker recommended continued reunification services for Bonnie C. and termination of reunification services for Russell G.

In an addendum report, prepared on January 16, 2003, the social worker recommended that reunification services be terminated as to both parents and that a section 366.26 hearing be set. The changed recommendation was based on Bonnie C.'s continued relationship with Russell G., which continued to include confrontations, seemed to take precedence over her relationship with I.G., and put a strain on her staying sober. Bonnie C. had also stopped participating in her reunification services because she was traveling from Reno to San Francisco weekly and because she felt she had completed all of her requirements, while the social worker believed she was still in need of continued work.

At the February 21, 2003 six-month review hearing, the juvenile court found that Bonnie C. had made substantial progress, but terminated reunification services as to Russell G.

At the March 27, 2003 review hearing (also designated a six-month review in the order), the juvenile court returned I.G. to Bonnie C.'s custody and requested that the State of Nevada supervise the case.

In a June 24, 2003 interim review report, the social worker reported that Bonnie. C. had moved back to San Francisco, and was living with I.G. in a trailer. I.G. appeared to be healthy and happy.

On August 28, 2003, the Department filed a second supplemental petition pursuant to section 387, along with a detention report, which alleged that Bonnie C. had abandoned I.G. with the former foster mother and with her 16-year-old daughter, Ashley. On both occasions, she appeared to be high on drugs. She then abandoned the child with personnel at a counseling center, who turned I.G. over to Russell G., who in turn turned her over to the social worker. The Department detained I.G. and placed her in foster care, and recommended termination of services and long-term foster care as the permanent plan. Three relatives were identified for placement assessment, including the maternal grandmother, Jacqueline B., of Los Angeles; a maternal great cousin, Kimberly W., of Compton; and a paternal aunt, Toni G. It was noted that I.G. had an excellent relationship with her older half-siblings, Ashley, Jonathan, and Von, whom she had seen regularly.

On August 29, 2003, the juvenile court ordered I.G. detained, pursuant to the section 387 petition. At a second detention hearing, held on September 3, 2003, the court again ordered I.G. detained in foster care.

On October 2, 2003, Russell G. filed a petition for modification, pursuant to section 388, in which he requested placement of I.G. with Toni G., the paternal aunt, who lived in Concord. In the petition, Russell G. stated that Toni G. knew I.G., lived near I.G.'s parents and siblings, and was willing to pursue adoption or guardianship. Russell G. stated that the Department was exploring a relative who lived in the Los Angeles area (Kimberly W.), whom I.G. did not know. In a supporting declaration, Russell G. stated that I.G. had visited Kimberly W. only once, while she had visited with

Toni G. on several occasions. In another declaration, Toni G. stated that she was "willing and prepared to adopt [I.G.], should reunification efforts fail."

On October 11, 2003, the Department moved I.G. from a temporary shelter placement to Kimberly W.'s home in the Los Angeles area. On October 20, 2003, Bonnie C. moved for an order barring placement of I.G. with Kimberly W.[2]

On November 20, 2003, the juvenile court, on its own motion, appointed an expert to determine I.G.'s best interests. On December 10, 2003, the court appointed a different expert to determine I.G.'s best interests "in light of her multiple moves in this matter," including the impact of the recent move to Los Angeles, the potential impact of a return to northern California, and the impact of remaining in Los Angeles, away from her siblings in northern California.[3]

On January 12, 2004, the hearing on the Department's section 387 petition and Russell G.'s section 388 petition took place. I.G.'s counsel began his cross-examination of the social worker by asking if she was recommending that the matter be referred to a section 366.26 hearing, to which the social worker responded in the affirmative. The court noted that this was not the recommendation on the section 387 petition, and the parents' counsel objected that the attempted cross-examination was outside the scope of direct examination. The court told I.G.'s counsel to "to keep the cross-examination to the issues that have been brought up on direct, and then if you want to re-call her at another time I will allow you to do that. Let's just keep the record clean."

After I.G.'s counsel concluded his cross-examination of the social worker, the court stated for the record that, in its section 387 detention report, the Department had recommended long-term placement as the permanent plan. Counsel said that he disagreed with the Department's recommendation in that regard, he believed that its

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[2] According to Bonnie C., this placement "was in violation of juvenile court orders and the subject of contempt proceedings which had not concluded by the time of the hearing subject to this appeal."

[3] The expert's conclusions are not included in the record on appeal, presumably because the expert had not yet submitted his or her findings.

recommendation had changed, and asked if he could inquire into whether the Department had changed its opinion. The court responded: "If the Department has a change of opinion it should have filed an addendum to the report. That is what that is for. [¶] . . . [¶] What we are on today for is the 387 and the recommendations of the report. If the Department has changed its recommendation, it needs to do that in a timely manner and serve all parties." In his closing argument, I.G.'s counsel argued that I.G. was unquestionably adoptable, given her young age and the fact that there were multiple family members who would be willing to provide her with a permanent home. Counsel further argued that, if the court was not going to return I.G. to her parents, if it was going to find that services had been reasonable, and was going to terminate services, "then it has no other choice than to order a .26 hearing . . . ."

At the conclusion of the hearing, the court found that I.G. was a person described by section 387; sustained the petition, as amended; found by clear and convincing evidence that reasonable efforts had been made to make it possible for I.G. to safely return home; terminated reunification services as to Bonnie C.; and committed I.G. to the care, custody, and control, of the Department for placement, planning, and supervision. Finally, the court acknowledged the argument of I.G.'s counsel for a section 366.26 hearing, but stated that "the Court only has before it the recommendation of the Department . . . and does feel that a 366.26, that request would have to be made at another time." In its written order, filed on January 22, 2004, the court found by clear and convincing evidence that I.G. was not a proper subject for adoption and that there was no one willing to accept legal guardianship, and ordered her into long-term foster care.

I.G.'s counsel filed a section 388 petition requesting a change in the permanent plan form long-term placement to adoption. On January 23, 2004, the juvenile court

entered its order summarily denying the petition, on the ground that it failed to state new evidence or a change of circumstances."[4]

Also on January 23, 2004, I.G. filed a notice of appeal from the summary denial of the section 388 petition.[5]

DISCUSSION

I.G. contends there was not substantial evidence to support the juvenile court's finding, by clear and convincing evidence, that I.G. was not a proper subject for adoption and, therefore, the order bypassing a section 366.26 hearing and placing I.G. in long-term foster care was unlawful and must be reversed. The Department agrees with I.G. Both Bonnie. C. and Russell G., however, assert that it would not have been appropriate for the court to set a section 366.26 hearing because the time period for reunification services

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[4] On January 20, 2004, the parties reached a preliminary settlement on the order to show cause for contempt, filed by Russell G., regarding the placement of I.G. with Kimberly W. in Los Angeles.

[5] I.G.'s notice of appeal stated that she was appealing the denial of her section 388 petition. In her briefs, however, I.G. has challenged only the decision of the court at the January 12, 2004 hearing to bypass the section 366.26 hearing and its refusal to allow cross-examination of the social worker regarding her changed recommendation. Given that the notice of appeal was timely filed with respect to the court's order bypassing the section 366.26 hearing, the notice of appeal mentioned the January 12, 2004 hearing on the section 387 petition, and the parents implicitly concede the appealability of this issue by arguing the merits in their briefs, we will construe the notice of appeal as being from the court's January 12, 2004 order refusing to set the section 366.26 hearing. (See *Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc*. (1998) 64 Cal.App.4th 955, 960-961 ["It is axiomatic that notices of appeal will be liberally construed to implement the strong public policy favoring the hearing of appeals on the merits. [Citation.] This policy is especially vital where the faulty notice of appeal engenders no prejudice and causes no confusion concerning the scope of the appeal. [Citation.]"]; see also *In re Dustin R*. (1997) 54 Cal.App.4th 1131, 1138, [order under section 366.22, subdivision (a), that minor who is not proper subject for adoption should remain in long-term foster care, unlike interlocutory order setting section 366.26 hearing, is final and appealable because nothing further is required to establish permanent plan].) We will not, however, specifically address the question of the court's denial of the section 388 petition, since I.G. has provided no argument related to that issue in her briefs.

had not yet expired, the parents had no notice that a section 366.26 hearing might be set, and I.G. was not a proper subject for adoption.[6] We disagree.

First, according to Bonnie C., the juvenile court lacked authority to set a section 366.26 hearing because Bonnie C. had received only approximately 11 months of reunification services between May 24, 2001, when I.G. was detained, and January 12, 2004, the date of the hearing on the section 387 petition. Because, for the rest of the time period prior to the January 12 hearing, I.G. was placed with Bonnie C., with family maintenance services provided, Bonnie C. submits that the request for a section 366.26 hearing was premature. Even assuming Bonnie C.'s calculations are correct, and ignoring the fact that when a child was under the age of three years on the initial date of removal, court-ordered services may not exceed six months unless the court finds, inter alia, that there is a substantial probability that the child will be returned to his or her parent within an extended time period not to exceed 18 months (§ 361.5, subd. (a)(2) and (a)(3)), this argument must fail.

"When a juvenile court sustains a supplemental petition pursuant to section 387, the case does not return to ' "square one" ' with regard to reunification efforts. [Citations.] Instead, the question becomes whether reunification efforts should resume. . . . Simply put, the court determines at what chronological stage of the 12- to 18-month period the case is for reunification purposes and then proceeds pursuant to section 366.21 or section 366.22[7] as appropriate." (*Carolyn R. v. Superior Court* (1995)

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[6] In his brief, Russell G. has joined in the arguments raised by Bonnie C., and has also raised additional related points.

[7] Section 366.22, which describes the procedures for the 18-month review hearing, provides, in relevant part: "If the child is not returned to a parent or legal guardian at the permanency review hearing, the court shall order that a hearing be held pursuant to Section 366.26 in order to determine whether adoption, guardianship, or long-term foster care is the most appropriate plan for the child. However, if the court finds by clear and convincing evidence, based on the evidence already presented to it, including a recommendation by the State Department of Social Services . . . , that there is a compelling reason . . . for determining that a hearing under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no

41 Cal.App.4th 159, 166 (*Carolyn R.*), fns. omitted; accord, *In re N.M.* (2003) 108 Cal.App.4th 845, 853.)

In determining which child welfare services counted toward the 18-month maximum time period, the appellate court in *Carolyn R.* cited section 361.5, subdivision (a), which now provides, in part: "Physical custody of the child by the parents or guardians during the applicable time period . . . may not serve to interrupt the running of the period."[8] As the *Carolyn R.* court explained: "This language obviously limits the section's mandate for services to the point in time which begins when the court initially orders a child removed from parental custody pursuant to section 361. [Citation.] [¶] The mother also sees a distinction between family reunification and maintenance services. . . . [¶] However, the section [361.5] speaks in terms of 'child welfare services' (§ 361.5, subd. (a)) which consist of maintenance as well as reunification services (§ 16500 et seq.). Both reunification and maintenance services are part of the continuum of child welfare services. (§ 16501, subd. (a).)" (*Carolyn R., supra,* 41 Cal.App.4th at p. 165, fns. omitted.)

The court in *Carolyn R.* concluded that, "when a parent is granted maintenance services but subsequently loses custody on a section 387 petition and is then granted reunification services, both the maintenance and the reunification services are counted in determining whether further services can be granted." (*In re N.M.*, *supra*, 108 Cal.App.4th at p. 853, citing *Carolyn R.*, *supra*, 41 Cal.App.4th at p. 165.)

In the present case, I.G. was detained on May 24, 2001. Bonnie C. thereafter received a combination of maintenance and reunification services totaling more than

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one willing to accept legal guardianship, then the court may, only under these circumstances, order that the child remain in foster care." (§ 366.22, subd. (a).)

[8] Bonnie C. notes that section 361.5 was amended in 2003 (Stats. 2003, ch. 28, § 1, p. 215)), and that the words "may not" were substituted for the words "shall not" in the portion of the statute we have quoted in the text. Bonnie C. has not shown how the change in language has altered the meaning of this section so as to render it inapplicable to the present situation or to undermine the holding of *Carolyn R.*, *supra*, 41 Cal.App.4th 159.

20 months at the time of the hearing on the section 387 petition.[9] The parents have not argued that an extension of the 18-month period was warranted due to, e.g., the fact that reasonable reunification services were not provided. (See *Carolyn R.*, *supra*, 41 Cal.App.4th at p. 167.) Therefore, pursuant to section 366.22, the juvenile court was required to set the matter for a section 366.26 hearing unless it found that that there was "a compelling reason . . . for determining that a hearing held under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship . . . ." (§ 366.22, subd. (a).) (See *Carolyn R.,* at p. 166; see also *In re John F.* (1994) 27 Cal.App.4th 1365, 1374-1375, fn. 5 ["Under section 366.22, the court *must* order the section 366.26 hearing sua sponte unless the exception of nonadoptability and no prospective guardian is established by clear and convincing evidence"].)[10]

The parents argue that the juvenile court properly refused to address the question whether it should set a section 366.26 hearing because that had not been the recommendation of the Department in its most recent report and, therefore, there had not

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[9] This case is distinguishable from *In re Joel T.* (1999) 70 Cal.App.4th 263, 268, and footnote 1, cited by Bonnie C., in which the appellate court found that, unlike family maintenance and reunification services, to which statutory time limitations apply, family *preservation* services, which were provided in *In re Joel T.*, are not similarly time limited.

[10] Russell G. argues that California Rules of Court, rule 1431, and not section 366.22, controls in this case. Rule 1431(e) provides: "If a dependent child was returned to the custody of a parent or guardian at the 12-month review or the 18-month review or at an interim review between 12 and 18 months and a 387 petition is sustained and the child removed once again, the court shall set a hearing under section 366.26 unless the court finds there is a substantial probability of return within the next six months or, if more than 12 months had expired at the time of the prior return, within whatever time remains before the expiration of the maximum 18-month period." Here, I.G. was returned to Bonnie C.'s custody the second time on March 27, 2003, at what was designated as a six-month review. Rule 1431(e), which is applicable only where the child was returned to his or her parent between the 12- and 18-month reviews, does not control in the present situation. Moreover, even if rule 1431(e) did control, the court would have had, if anything, *less* discretion to bypass a section 366.26 hearing than it would under section 366.22, subdivision (a).

been sufficient notice to the parties that such a result might follow if the section 387 petition were sustained. The parents argue that the court's refusal to permit I.G.'s counsel to cross-examine the social worker regarding her changed recommendation was proper for the same reason. We disagree.

In *Carolyn R.*, *supra*, 41 Cal.App.4th 159, the mother argued that the court could not set a section 366.26 hearing because it had not warned her at the prior review hearing that if the children could not be returned by the next review hearing, a section 366.26 hearing could be set. (*Id.* at p. 164.) Although she was correct that she had not been given such notice at the previous review hearing, the court nonetheless found that, "despite the mother's claim of procedural error, she was aware of the consequences in the event she could not correct the problems which led to her children's dependency status. At the outset of this case, the court did warn her that her parental rights could be permanently terminated in the event of unsuccessful reunification. Thus, assuming solely for the sake of argument that there was error, it was harmless." (*Ibid*.)

Likewise, in this case, the parents had received repeated warnings, from the beginning of the dependency, that termination of their parental rights was a possibility once services had been provided for a maximum of 18 months. They also knew from the detention report that accompanied the second section 387 petition that the Department was recommending termination of Bonnie C.'s reunification services. Hence, the parents *had* notice of what might occur. They also would have the approximately 120 days before the section 366.26 hearing took place to prepare for that hearing, where they could contest termination of their parental rights.[11]

In addition, the Department's recommendation of long-term foster care in its detention report did not justify the court's apparent abdication of its statutory obligation to set a section 366.26 hearing in the absence of specific and narrow exceptions,

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[11] The parents misconstrue I.G.'s argument that the court could have briefly continued the hearing, on its own motion or at the request of parents, to allow the parents time to prepare to argue against a section 366.26 hearing. Instead they assert that I.G. should have requested a continuance, but did not.

particularly given that, by the time of the January 12, 2004 hearing, the social worker's recommendation was for the setting of a section 366.26 hearing. (See § 366.22, subd. (a); *In re John F., supra,* 27 Cal.App.4th at pp. 1374-1375, fn. 5; *Carolyn R.*, *supra*, 41 Cal.App.4th at p. 166.)[12]

A similar refusal to set a section 366.26 hearing was discussed in *In re John F.*, *supra*, 27 Cal.App.4th 1365, in which Division Four of this District addressed the juvenile court's failure to set a section 366.26 hearing based on the recommendation of the Department, where the Department routinely recommended long-term foster care instead of guardianship or adoption primarily because it had not yet commenced the required home study. (*Id.* at p. 1369.) The appellate court discussed the policy informing the dependency scheme, " a policy that respects the child's interest in belonging to a family unit and protects his or her right to 'a placement that is stable, permanent, and that allows the caretaker to make a full emotional commitment to the child.' [Citation.] Consonant with this policy, long-term foster care is discouraged as a permanent placement solution for dependent children." (*Id*. at p. 1376, fn. omitted; accord, *In re Christiano O*. (1997) 58 Cal.App.4th 1424, 1433.)

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[12] Moreover, the social worker's barred testimony regarding the reasons for her present recommendation to set a section 366.26 hearing would have been relevant to the court's determination whether exceptional circumstances permitting bypass of such a hearing were applicable. (See § 366.22, subd. (a).) Also, as I.G. asserts, California Rules of Court, rule 1412(j)(2), which requires the court to advise the child of the right to cross-examine the persons who prepared reports or documents filed with the court as well as witnesses called to testify at the hearing, affirms that I.G. had a right to cross-examine the social worker regarding her recommendation.

The parents argue that I.G. has waived her contention that the court improperly limited counsel's cross-examination of the social worker regarding her changed recommendation by failing to raise the issue later in the hearing, as invited to do by the court. In fact, later in the hearing, when I.G.'s counsel asked whether he could ask the social worker about her changed recommendation, the court refused, stating that, if the Department had changed its opinion, it should have filed an addendum to its previous report. The court thus simply refused to consider any alternative to the initial Department recommendation of long-term foster care.

The *In re John F.* court explained: "Concerned about the outcome of a section 366.26 hearing without the benefit of the home assessment or the Department's informed recommendation, the court deprived John of an earlier opportunity for a stable and permanent home. The court also commented on the relatively short 120-day period for setting the hearing. We infer from the court's remarks that this issue tied into its related concern about 'the mother's progress and what happens to the mother. . . .'

"These concerns, at that juncture of the dependency proceedings, were inappropriate. The statutory scheme limits the time in which children must wait for parents to demonstrate themselves capable of responsible parenthood. Here, reunification services had been terminated and the court failed to revive them. John's need for permanency and stability then become paramount and the court's focus should have veered to track these needs. [Citation.] The court did not have discretion to maintain John in the uncertainty of foster care by procrastinating and deferring decision on more permanent placement options *when it knew those options were not foreclosed*. The section 366.26 procedure was the door that would open up these options." (*In re John F.*, *supra*, 27 Cal.App.4th at pp. 1376-1377; see also *In re Christiano S.*, *supra*, 58 Cal.App.4th at pp. 1426, 1432 [juvenile court improperly punished department for failing to give proper notice of hearing to parents by refusing to continue section 366.26 hearing to consider department's recommendation for adoption and by ordering children into long-term foster care, thereby taking away any chance children might have had to find permanent and stable home].)

In the present case, the juvenile court's refusal to set a section 366.26 hearing, like the juvenile court's decision in *In re John F.*, was plainly based on concerns extraneous to whether exceptional circumstances existed justifying the bypass of a section 366.26 hearing. In deciding on long-term placement, the court did not even appear to address, as it must to bypass a section 366.26 hearing, whether I.G. was a proper subject for adoption or whether legal guardianship was a possibility. The court's decision seems to have been based solely on the recommendation of the social worker in the detention report that

accompanied the second section 387 petition.[13] The court did check boxes in its minute order, next to the statement that the court had reviewed all permanent plan options and had found by clear and convincing evidence that "[t]he child is not a proper subject for adoption, and no one is willing to accept legal guardianship." However, this appears to be mere pro forma verbiage, and does not negate our conclusion that the court failed to determine whether these exceptions were applicable here.

Even were we to assume the court did in fact review the evidence before it and conclude, by clear and convincing evidence, that I.G. was not a proper subject for adoption and that no one was willing to accept legal guardianship, we find that there was not substantial evidence to support such a finding. (See, e.g., *In re Christiano O.*, *supra*, 58 Cal.App.4th at p. 1431; *In re Autumn H.* (1994) 27 Cal.App.4th 567, 576.)

Again, pursuant to section 366.22, the juvenile court was required to set the matter for a section 366.26 hearing unless it found that that there was "a compelling reason . . . for determining that a hearing under Section 366.26 is not in the best interest of the child because the child is not a proper subject for adoption and has no one willing to accept legal guardianship . . . ." (§ 366.22, subd. (a).) The parties observe that no case or statute has defined the phrase "proper subject for adoption" in subdivision (a) of section 366.22. In many cases, appellate courts have used the phrase to mean, essentially "adoptable." (See, e.g., *Victoria S. v. Superior Court* (2004) 118 Cal.App.4th 729, 732; *In re John F., supra,* 27 Cal.App.4th at pp. 1374-1375, fn. 5.) I.G. argues that we should equate "proper subject for adoption" with "adoptable," and Bonnie C. implicitly agrees. Russell G. disagrees, but offers no alternative construction. Lacking authority to the contrary, we conclude that "proper subject for adoption" means something at least akin to "adoptable."

[13] As the court stated at the conclusion of the hearing, when it refused to address whether to set a section 366.26 hearing: "What we are on today for is the 387 and the recommendations of the report. If the Department has changed its recommendation, it needs to do that in a timely manner and serve all parties."

In the context of an adoptability finding at the section 366.26 hearing, it is settled that, because the focus is on the child, it is not essential to have a proposed adoptive parent already lined up. (*In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.) " 'Usually, the fact that a prospective adoptive parent has expressed interest in adopting the minor is evidence that the minor's age, physical condition, mental state, and other matters relating to the child are not likely to dissuade individuals from adopting the minor. In other words, a prospective adoptive parent's willingness to adopt generally indicates the minor is likely to be adopted within a reasonable time either by the prospective adoptive parent or by some other family.' [Citation.]" (*Ibid*., italics omitted.)

In the present case, the evidence shows that, although I.G. had kidney disease as a newborn, she was no longer medically fragile and was thriving in every way. The Department repeatedly described her as healthy and happy and developmentally on target. I.G. was approximately two and one-half years old at the time of the hearing and there were two relatives—a paternal aunt and a maternal "great" cousin—who had said they were willing to adopt I.G. and/or become her legal guardian. Moreover, at the January 12, 2004 hearing, before the juvenile court improperly prohibited further questioning on the issue, the social worker testified that she now recommended that the matter be set for a section 366.26 hearing.

Although there was a dispute among the parties about I.G.'s relative placement, a notation in the Department's last detention report that it had received information that the Indian Child Welfare Act could apply, and a need to continue monitoring her kidney problem, these facts plainly do not provide substantial evidence of exceptional circumstances warranting the bypass of a section 366.26 hearing.[14] None of these facts show that I.G. is not adoptable or that no one would be willing to act as her legal guardian, particularly in light of the evidence in the record to the contrary. (See *In re*

[14] Of course, if any of the parties were concerned that the 120-day time period within which the section 366.26 hearing must be set did not allow enough time to fully assess these issues, that hearing, for good cause, could be continued. (See § 352; *In re John F.*, *supra*, 27 Cal.App.4th at p. 1378.)

John F., *supra*, 27 Cal.App.4th at p. 1376; compare *In re Amelia S.* (1991) 229 Cal.App.3d 1060, 1065 [permanency hearing report's indication that a few foster parents were considering adopting some of 10 children in a sibling group, all of whom had social delays, was "a far cry" from clear and convincing evidence required to establish likelihood of adoption].)

The Department's assessment, which must be prepared before the section 366.26 hearing, along with the parties' evidence and argument, will address in detail the likelihood that I.G. will be adopted, as well as whether there is someone willing to accept legal guardianship. (See § 366.22, subd. (b).) From this evidence, the juvenile court will be in a position to decide on the proper disposition. (See § 366.26, subd. (b).)[15] Obviously, should the evidence at the section 366.26 hearing clearly establish that I.G. is not likely to be adopted and that guardianship is not an available option, then she would continue in long-term foster care. (See *Victoria S. v. Superior Court*, *supra*, 118 Cal.App.4th at p. 734.)

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[15] In *In re John F.*, *supra*, 27 Cal.App.4th at pages 1374-1375, the court described the required contents of the assessment and the court's steps in determining a permanent plan at the section 366.26 hearing. First, "the court must . . . direct the social service agency to prepare an assessment on the following matters, among others: (1) review of the amount and nature of contact between minor and parents/extended family; (2) evaluation of minor's medical, developmental, scholastic, mental and emotional status; (3) preliminary assessment of the eligibility and commitment of prospective adoptive parent or guardian, including social history (screening for criminal records and prior referrals for child abuse or neglect); capability of person to meet minor's needs; and understanding of the legal and financial rights and responsibilities of adoption and guardianship; (4) description of the relationship of minor to the prospective adoptive parent or guardian, including its duration and character and the adult's motivation for seeking adoption or guardianship; and (5) analysis of the likelihood that the minor will be adopted if parental rights are terminated. (§ 366.22. subd. (b).)

"Then, at the section 366.26 hearing, the court must review and consider the assessment and identify the permanent plan, whether it is (1) severance of parental rights and placement for adoption; (2) identification of adoption as the permanent plan goal without terminating parental rights, thereby affording additional time to locate an appropriate adoptive family; (3) appointment of a guardian for the minor; or (4) placement in long-term foster care. (§ 366.26, subd. (b).)"

Moreover, the question raised by Bonnie C. regarding whether it would be detrimental to I.G. and not in her best interest to terminate parental rights due to her close relationship with her half-siblings and her mother (see § 366.26, subd. (c)(1)(A), (c)(1)(E)) can be addressed at the section 366.26 hearing, though only if the court finds it likely that I.G. will be adopted. (See *In re Christiano O.*, *supra*, 58 Cal.App.4th at p. 1433.) Such a finding prior to that time would be "premature and . . . of no effect." (*Id*. at p. 1434.)

Because we conclude substantial evidence did not support the juvenile court's factual finding, by clear and convincing evidence, that a hearing pursuant to section 366.26 would not be in I.G.'s best interest because she is not a proper subject for adoption and has no one willing to accept legal guardianship (§ 366.22, subd. (a)), its order bypassing a section 366.26 hearing must be reversed and the matter must immediately be set for the long-overdue section 366.26 hearing.

DISPOSITION

The juvenile court's order bypassing a section 366.26 hearing and placing I.G. in long-term foster care is reversed. The matter is remanded to the juvenile court for proceedings consistent with this opinion.

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Kline, P.J.

We concur:

_____
Haerle, J.

_____
Ruvolo, J.